1986

State of Utah v. Russell G. Slowe : Petition for Rehearing

Utah Supreme Court

Sandra L. Sjogren; Assistant Attorney General; Attorney for respondent.
Peter W. Guyon; Guyon & Guyon; Attorney for Appellant .

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff and Respondent,	:	
v.	:	PETITION FOR REHEARING
RUSSELL G. SLOWE, SR.,	:	
Defendant and Appellant.	:	

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THE STATE OF UTAH,	:	
Plaintiff and Respondent,	:	
v.	:	No. 19990 & 20070
RUSSELL G. SLOWE, SR.,	:	
Defendant and Appellant.	:	

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Petition for rehearing of Defendant-Appellant's appeals in both matters before this Court and of this Court's decision of December 30, 1985 affirming Defendant-Appellant's convictions in both.

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COMES NOW Defendant-Appellant and pursuant to the provisions of Rule 35, Utah Rules of Appellate Procedure, herewith moves the Court for a rehearing on both matters pending before this Court and in support of this motion respectfully states that this Court has overlooked or misapprehended the following points of law or fact:

I

ARGUMENT

1. In case number 19990, jury instruction 6(3) imposes an unconstitutional burden upon Defendant-Appellant and relieves the State of its burden of proof.

Jury instruction 6(3) states in pertinent part as follows:

> The Utah statutes provide that if a person has possession of property recently stolen and gives no satisfactory explanation of such possession . . . the jury may conclude the person had an intent to deprive the true owner of the property and may convict him, if all the circumstances do, in fact, satisfy the jury beyond a reasonable doubt that the Defendant is guilty thereof. (emphasis added)

While this matter was pending, but before the Court's decision thereon, this Court ruled in the case of **State v. Chambers**, 20 Utah Adv. Rep. 14 (1985) at 18

> . . . that a jury instruction using the language of U.C.A., 1953, Section 76-6-402(1) is unconstitutional because it directly relates to the issue of guilt and relieves the State of its burden of proof.

The Court further states in the Chambers case at 18 that

> . . . the statutory language should not be used in any form in instructing jurys in criminal cases, and we expressly disavow the language and holdings of our earlier cases to the contrary.

The instruction to which Defendant objects in this case suffers from the same constitutional infirmities as the instruction in the Chambers case. Although the instruction in this case does not contain the words "prima facie," its effect is the same in that the instruction creates a mandatory rebuttable presumption. In Chambers this Court discussed Francis v. Franklin, 105 S.Ct. 1965 (1985) and the case of Sandstrom v. Montana 442 US 510 (1979). In this Court's analysis, those two United States Supreme Court cases have established the principle that a presumption in a criminal case, albeit a rebuttable one, is unconstitutional. As this Court quoted from the Sandstrom decision, found at 1972-1973:

> A mandatory rebuttable presumption . . . relieves the State of the affirmative burden of pursuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant pursuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous [than an irrebuttable or conclusive presumption] from the defendant's perspective, but it is no less unconstitutional.

It is, therefore, Defendant's position in this case that the instruction set forth above provides a rebuttable presumption; that it imposes upon Defendant the obligation of giving a "satisfactory explanation of such possession . . ." of allegedly stolen property, and that such requirement violates the mandates of those authorities set forth above.

2. **In case #20070 the State's expert witness did not testify to the fair market value of the allegedly stolen property.**

The State's expert witness, both in oral testimony and written appraisal, which was admitted into evidence as State's exhibit 6-P, never established what the fair market value of the allegedly stolen property was. The exhibit itself states that $2,878.00 was the replacement value of the ring in question. Furthermore, Mr. West stated (R,399-R,400) that "a good part" of his appraisals were for insurance purposes and would, therefore, go to the replacement value of an item, as would the estate appraisal. Mr. West recognized (R,400 18-23) that the definition of the fair market value of any item is the price a willing buyer and a willing seller can agree upon. Mr. West further stated at (R,400 21-23) that "nobody can say for sure what two people are going to determine what that might be."

The point is that Mr. West was asked and gave the replacement value of the item for insurance purposes or for estate value, but at no time was he asked and at no time did he give any opinion regarding the fair market value of the ring in question.

3. **In case number 20070, the misstatements of fact in the underlying affidavit for search warrant were not "minor discrepancies" and were in fact made knowingly and intentionally.**

This Court has held in its previous decision that the allegations in the affidavit for search warrant were "essentially accurate." 25 Utah Adv. Rep. at 22. Defendant contends that the affidavit must fail because the statements were false. The affiant's misstatements of fact in the affidavit for search warrant (R3-4) are highlighted below, with an explanation of the basis of Defendant's contentions as follows:

> **Slowe was told by John Gallegos that the ring is stolen and that he needed some quick cash.**

This statement is absolutely false by reason of the fact that Cottam, the affiant, had absolutely no conversation with Gallegos after the "reverse sting" operation but prior to executing the affidavit. Cottam testified at a suppression hearing that after the "reverse sting" operation that Cottam received a hand signal from Gallegos ". . . to be shown as to whether or not a sale had been made or not." (R200, L 24-R200 L1)

Cottam then testified that he met Gallegos and had a conversation of approximately 15 seconds with him prior to executing the affidavit for search warrant. (R202, L7) Cottam's recollection of the conversation was as follows:

> **I said did the deal go down exactly as we talked about, and he said yes, he bought it, and he showed me the money. (R202, L9-13)**

According to Cottam's own testimony, the only information that Gallegos gave him was that information set forth above. However, none of that information is stated as part of the grounds for issuance of the search warrant. Cottam, in the affidavit, is speaking in the first person, and nowhere does it say that John Gallegos provided the information. Since the alleged "facts" were not known to Cottam, and since he had not been told them, he cannot legally have stated them as fact on the affidavit. These allegations are pure assumptions on the part of Cottam.

Slowe purchased the ring, believing it was stolen, and the ring is currently in the business at this time.

The first statement that "Slowe purchased the ring" in and of itself may be an accurate statement, but it does not state the source of the statement. The affidavit, written in the first person, leaves only the conclusion that that information is in the affiant's mind at the time he executed the affidavit. However, such is not true. As discussed above, after the operation was terminated, the only information provided by John Gallegos to the affiant was a 15 second conversation wherein Gallegos told Cottam that Slowe had purchased the ring and Gallegos showed Cottam the money. (R202, L9-11) There is,

however, no statement in the affidavit that this allegation is based on the hearsay information of the police informant, certainly an important piece of information to the magistrate.

The statement of Slowe's "believing it was stolen," is merely a conclusion on the part of the affiant, and has no basis in fact whatsoever. It may have been Mr. Cottam's assumption that Slowe knew the ring was stolen, but certainly such an assumption is not competent information to provide for the issuance of a search warrant based thereon.

These acts were recorded on tape and observed by affiant and other police officers nearby.

Again, this statement is entirely erroneous. Cottam admitted that he was not able to see the alleged sale, (R206, L18; and R208, L1-7) neither did Cottam hear the transaction prior to executing the affidavit. (R206, L25 - R207, L8) Furthermore, Cottam was not told by either of the detectives supossedly observing the transaction, i.e. Hall or Garrett, what those officers saw, if anything. (R197, 14-16 and R209, L6-10)

Neither did Cottam know if the transaction had been actually recorded on tape, as he alleged in the affidavit. (R198, 3-6)

The allegations made by Cottam in the affidavit were purely and simply assumptions that Cottam anticipated would have occurred by the time he actually executed the pre-prepared

affidavit. The point is, if the alleged "facts" which Cottam made but which were unknown to him are deleted from the grounds for issuance of the search warrant, only the following remains:

> On 12/15/83, police agent John Gallegos entered the business of Crazy Horse Jewelry, 2470 Washington, . . . Slowe purchased the ring, . . . and the ring is currently in the business at this time.

Certainly the foregoing "facts" do not come even close to providing the information necessary to establish probable cause for the issuance of a search warrant.

Although Cottam at no point in the affidavit ever gave any indication whatsoever that Gallegos, the police informant, was the source of any of the "facts" alleged in the affidavit Cottam goes on to justify on page 2 of the affidavit that Gallegos was a reliable source of information as follows:

> **Your affiant considers the information received from the confidential informant reliable because: Gallegos has assisted police on prior occasions, resulting in the clearance of more than 25 burglaries, and several felony arrests and convictions.**

In the first place, as alluded to above, the affiant never once indicated that any information in or on the affidavit was received from Gallegos. The entire affidavit is written in the first person and one must assume therefrom that all of the "facts" alleged therein were within the mind of the affiant. Certainly hearsay information is not inadmissable for purposes of the issuance of a search warrant. However, such information must

certainly be identified as such. The foregoing is, then, merely surplusage which pretends to support the unidentified information supposedly provided by a confidential informant, and even fails to state any "underlying circumstances" to establish the credibility of any confidential informant as required by the United States Supreme Court in the tests of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 732 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 21 L.Ed. 2d 637 (1969), or the comprehensive test propounded by that Court in Illinois v. Yeates, ___ U.S. _____, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

Again, the statement itself is not only unreliable because it fails to meet the tests set forth above, but it is inherently misleading because it pretends to provide additional information establishing the credibility of an informant who has not even been identified as the source of any information in the search warrant. To propound the problem the affiant alleges certain "facts" to corroborate information received from the confidential informant by stating:

> **The following information corroborates the facts given by the confidential informant: Police officers recorded the conversation by use of a tape recorder and had constant view of the store and on-sight view of our informant.**

Again, there can be no "corroboration" of facts given by any confidential informant when none of the information contained anywhere in the affidavit is identified as having come

from said any confidential informant. It would be one thing if Cottam had stated "Gallegos, a police informant, stated . . ." However, he did not. The reader of the affidavit cannot tell from the 4 corners of the affidavit what, if any,information was received by Cottam from Gallegos. Secondly, the allegation that the police officers recorded the conversation and had "constant" view of the store and "on-sight" view of the informant is entirely erroneous and without any foundation whatsoever. As is discussed above, Cottam had no conversations with any of the detectives after the operation and prior to the execution of the search warrant during which he could have obtained any of the information set forth. At that point neither did Cottam know whether the conversation had been recorded by the narcotics bureau office (R198, L3-6) and during his 15 second conversation with Gallegos had no opportunity to discuss with the matter with Gallegos or verify whether or not the conversation had actually been recorded. Furthermore, Cottam admitted (R196, L24-25) that he only was able to see Gallegos arrive at Defendant's place of business and leave, and stated that he himself could not see what was going on the inside of Defendant's business during the transaction. (R196, L25 through R197, L1)

Again, the information provide by Cottam in the affidavit is nothing more than Cottam's assumption that the conversations were recorded and that officers had constant view

of the store and on-sight view of the informant. This statement on the part of Cottam is at best misleading and at worst a serious misstatement of what actually occurred.

Defendant does not accuse the officer who submitted the search warrant affidavit with "recklessly" submitting a false affidavit in the criminal sense. However, Defendant does argue that the affiant submitted the same intentionally and knowingly in the sense that the affiant knew and recognized the acts he performed and the result that was to follows.

The definitions of "intentionally" and "knowingly," in the criminal code, while perhaps creating a standard higher that contemplated here, nonetheless provide a basis for Defendant's allegations. The definition of "intentionally" at 76-2-103, Utah Code Annotated (1953) is that conduct is so done ". . . when it is his conscious objective or desire to engage in the conduct or cause the result." As for "knowingly," a person acts ". . . when he is aware that his conduct is reasonably certain to cause the result."

Surely it is clear from the record that the affiant had that kind of intent and knowledge. Since the affiant had discussed the matters with no one prior to his execution of the affidavit, it can hardly be said that he did not know he was making false statements. While the affiant may have understood in the general sense that the other officers to whom he

attributes information he put in his affidavit did actually see the circumstances unfold, nevertheless, the affiant did not know those facts, and his statements to the contrary are erroneous.

II

CONCLUSION

Jury instruction 6(3) in case 19990 is unconstitutional in that it imposes upon Defendant a burden proscribed by law. The Chambers decision referred to herein clearly requires this Court to strike down the conviction and grant a new trial.

In case number 20070 the State's expert witness Mr. West utterly failed to establish the fair market value of the allegedly stolen merchandise in accordance with the Court's instruction (R.76) that fair market value is . . .

> the highest price, estimated in terms of money, for which the property would have sold in the open market at the time and in that locality, if the owner was desirous of selling, but under no urgent necessity of doing so, and if the buyer was desirous of buying but under no urgent necessity of so doing, and if the seller had a reasonable time within which to find a purchaser, and the buyer had knowledge of the character of the property and of the uses to which it might be put.

Defendant contends that Mr. West was never even qualified as an expert within the requirements imposed by the Court. The information he gave was competent only as evidence of replacement value or estate value, neither of which is relevant to the issue of fair market value.

On the question of the sufficiency of the affidavit for search warrant in #20070, this Court has, in its previous ruling, validated an affidavit containing major misstatements of fact on the part of the affiant. As a matter of policy, this Court should require more than a collection of assumptions in affidavit form before it validates a serious intrusion into areas protected by the 4th Amendment to the U.S. Constitution.

Based on the foregoing, Defendant respectfully requests that this matter be reheard in its entirety.

DATED this 24 day of January, 1986.

Peter W. Guyon
Attorney for Defendant-Appellant

CERTIFICATION OF COUNSEL FOR PETITIONER

I, Peter W. Guyon, counsel for Petitioner, hereby certify that the instant petition for rehearing is presented in good faith and not for purposes of delay.

Peter W. Guyon
Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

The undersigned certifies that on the date below a true and correct copy of Defendant-Appellant's MOTION FOR REHEARING AND ORDER GRANTING SAME was mailed to David L. Wilkinson, Attorney General of the State of Utah, ATTN: Sandra L. Sjogren, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 with all postal and other fees prepaid.

DATED this 27 day of January, 1986.